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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 313

E. F. HAMMONS,

Petitioner,

v.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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A supplemental brief is necessary to correct representations made by petitioner in his reply brief. (The numbers below correspond with the supplemented paragraph in the Brief in Opposition.)

3. Petitioner claims that the Seventh Amendment affords no protection to respondent because the conclusion of law and finding of fact "are so intermingled," citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254. However, the conclusion of law was simply that the respondent was not negligent; the finding of fact was the same. The Court charged the jury on the negligence issue requested by petitioner, and no complaint has been made, even now, to the Court's charge on this issue. Therefore, petitioner's effort to transform his appeal to the Supreme Court for an inconsistent fact finding should be apparent.

5. Petitioner claims that respondent "does not dispute the fact that there was no evidence" of an unavoidable accident. This is denied. Roadmaster Neely testified that certain weather conditions cause rails to break. This was confirmed by petitioner's own witness, E. A. Kyle. (S.F. 447) Furthermore, this particular rail lead had been closed from the mid 1940s until 1955, then had been thoroughly rehabilitated, and since then had been regularly inspected. See, e.g., S.F. 500-505, 526. [It is interesting to note that petitioner claimed that he rode over this lead while, in fact, it had been closed and spiked at the main line. See, e.g., S.F. 44] Therefore, there was ample evidence that the accident happened without anyone being negligent — which is exactly the charge of the Court on unavoidable accident.

Petitioner's position was expressly rejected by the Fifth Circuit in *Neal* v. *Lykes Brothers Steamship Company,* 306 F. 2d 313 (1962). See also *Quintero* v. *Sinclair Refining Co.,* 311 F. 2d 217 (C.A. 5, 1962). The unreported opinion of that Court in *Page* v. *St. Louis Southwestern R. Co.* merely approves the trial court's refusal to submit a special interrogatory in a particular case. It does not, as petitioner infers through skillful editing, ban the issue in all FELA cases. To the contrary, the Court expressly approves the charge that "the happening of an accident does not itself alone give rise to an inference of negligence." (Reply brief, p. 12).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should not be granted.

Respectfully submitted,

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TOM M. DAVIS

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RICHARD B. MILLER

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CERTIFICATE OF SERVICE

This is to certify that on the ..... day of September, 1965, a true and correct copy of this Supplemental Brief in Opposition was served on John P. Spiller, 4714 Fannin Street, Houston, Texas 77004 by placing same in the United States mails, properly addressed, postage prepaid, certified mail.

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TOM M. DAVIS